

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
October 11, 2007 Session

C. RICK POINTS v. WAYMOND LEE THOMPSON, ET AL.

**Appeal from the Circuit Court for Maury County
No. 10207 Robert L. Holloway, Jr., Judge**

No. M2006-02425-COA-R3-CV - Filed January 9, 2008

In this case arising from an automobile accident, the issues presented are whether there is material evidence supporting the jury verdict in favor of the plaintiff and whether the trial court erred in denying the plaintiff's motion in limine to exclude, as inadmissibly speculative, portions of his own medical expert's testimony on cross-examination. Because we find that there is material evidence supporting the jury verdict and that the trial court did not abuse its discretion in denying the plaintiff's motion in limine, we affirm the judgment of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed

SHARON G. LEE, J., delivered the opinion of the court, in which PATRICIA J. COTTRELL, P.J., M.S., and ANDY D. BENNETT, J., joined.

David A. Bates and C. Nicholas Fossett, Columbia, Tennessee, for the Appellant, C. Rick Points.

W. Carl Spining and Julie Bhattacharya Peak, Nashville, Tennessee, for the Appellee, Elbert Thompson d/b/a Thompson Trucking.

OPINION

I. Background

On March 21, 2002, C. Rick Points was involved in a motor vehicle accident where his Ford Explorer was struck in the rear by a truck driven by Waymond Thompson. Points sued Waymond Thompson and Elbert Thompson d/b/a Thompson Trucking, the owner of the truck (collectively "Thompson"), alleging that the defendants' negligence in the accident caused him to suffer physical injuries, loss of employment earnings and earning capacity, medical expenses, and pain and suffering. Points later voluntarily dismissed his action against the driver of the truck and proceeded to trial against the owner.

At the jury trial in August of 2006, Thompson admitted fault in the accident, leaving only the questions of causation and extent of Points's damages. Before trial, Points filed a motion in limine to exclude all portions of Thompson's cross-examination of one of Points's treating physicians, Dr. Jane Howard, regarding any "possible" causes of his injuries, arguing that his own witness's testimony on cross-examination as to "possible" causes would be speculative and inadmissible. The trial court denied the motion in limine, allowing the jury to see the entire testimony of Dr. Howard via videotaped deposition taken for proof. The jury returned a verdict in favor of Points in the amount of \$64,000. Points filed a motion for new trial or additur, arguing, among other things, that the amount of the verdict was manifestly insufficient and that the trial court erred in allowing the testimony sought to be excluded by the motion in limine.

The trial court denied Points's motion for a new trial or additur, finding no error in the decision to allow the jury to see the challenged portions of Dr. Howard's deposition testimony, and further stating as follows:

[T]he Court makes three findings – first, that there is sufficient material evidence to support the jury verdict; second, the jury verdict is not manifestly insufficient; third, the jury verdict was within the range of reasonableness adequate to compensate the Plaintiff.

Having approved the verdict, the trial court entered a judgment in favor of Points in the amount of \$64,000 plus discretionary costs in the amount of \$9,912.53.

II. Issues Presented

Points appeals, raising the following issues:

1. Whether the trial court erred in finding that there was sufficient material evidence to support the jury verdict.
2. Whether the trial court erred in refusing to exclude all portions of Thompson's cross-examination of Points's treating physician relating to "possible" causes of Points's injury.

III. Analysis

A. Standard of Review

Our standard of review of a jury verdict that has been approved by the trial judge as thirteenth juror is well settled, as recently restated by our Supreme Court:

The applicable standard of review is set out in Tennessee Rule of Appellate Procedure 13(d), which provides, "[f]indings of fact by a jury in civil actions shall be set aside only if there is no material evidence to support the verdict."

* * *

When addressing whether there is material evidence to support a verdict, an appellate court shall: (1) take the strongest legitimate view of all the evidence in favor of the verdict; (2) assume the truth of all evidence that supports the verdict; (3) allow all reasonable inferences to sustain the verdict; and (4) discard all countervailing evidence. Appellate courts shall neither reweigh the evidence nor decide where the preponderance of the evidence lies. If the record contains “any material evidence to support the verdict, the jury’s findings must be affirmed; if it were otherwise, the parties would be deprived of their constitutional right to trial by jury.”

Whaley v. Perkins, 197 S.W.3d 665, 671 (Tenn. 2006) (internal citations and brackets omitted).

B. Material Evidence Supporting Jury Verdict

Points argues that there was no material evidence supporting the jury verdict because it was manifestly insufficient in light of the proof presented regarding his medical expenses, loss of earning capacity, and permanent vocational impairment. Our review of the record in keeping with the above-stated standard of review yields the conclusion that, although the jury award was significantly lower than Points’s total damages, there was material evidence from which the jury could have concluded that a significant portion of his injuries were not caused by the accident.

At all times relevant to this case, Points has worked at the Williams Funeral Home in the Columbia, Tennessee area. Before the accident, Points was employed primarily as a salesman for the funeral home, earning straight commissions. He was by all accounts a highly successful salesman, averaging over a million dollars per year in funeral-related sales. After the accident on March 21, 2002, Points suffered a significant amount of back and neck pain that reduced his sales work. His employer restructured his compensation package to include a salary and he worked more as a funeral director than as a salesman.

Points presented the testimony of Patsy Bramlett, a vocational rehabilitation counselor, who testified that Points was restricted to sedentary or light work, that he was unable to perform all of the duties of a funeral director, and that his earnings had significantly decreased since the accident.

Shortly after the accident, Points went to Dr. Tom Bartsokas, who treated him from April through December of 2002. A record from Dr. Bartsokas dated May 14, 2002, indicated that Points “is progressing nicely and showing no evidence for possibly needing long-term care for his condition.” Dr. Bartsokas noted on June 12, 2002, that Points “is very pleased to report that at times since I saw him he has felt well and as though he was fully recovered.” In July of 2002, Points reported to Dr. Bartsokas that his condition had improved dramatically and that he was able to do “vigorous” yard work. Points testified as follows regarding his visit to Dr. Bartsokas in September of 2002:

Q: And then, in September of 2002, September 3rd, I think, of 2002, you went to see Dr. Bartsokas. And at that point, you reported to him that you were feeling wonderful, right?

A: Yes, sir.

Q: And that you weren't having any pain at all, any symptoms whatsoever.

A: Yes.

Q: And he released you from his care, correct?

A: I asked him if he would release me.

* * *

Q: Do you remember, in September of '02, that you also told – this was the visit when you were feeling wonderful – that you told Dr. Bartsokas that you were not having any problems whatsoever with driving?

A: Right.

Q: You didn't have any restrictions as far as riding in a car and all of that.

A: Feeling great. I sure was.

In December of 2002, Points attempted to lift and move a dead body by himself. On another occasion that same month, he tried to help another person lift and move another body. Points testified that "I have tried, when I was feeling good, to lift a 20-gauge casket with some of the gentlemen, and I realized I could not do that." Also in December, the funeral home arranged to have candles placed at every grave site of a local cemetery, several thousand candles in all, and Points testified that he tried to bend over at each one and check to make sure the wicks were properly positioned. After the lifting of the two bodies and his participation in the candlelight service, Points returned to Dr. Bartsokas with complaints of severe back pain. Points asked Dr. Bartsokas at his December 2002 visit whether his lower back pain could be related to the accident, and Dr. Bartsokas replied that it was his medical opinion that "it would be very difficult for me to correlate his current symptoms and conditions to the automobile accident."

After December of 2002, Points was treated by several medical specialists for continuing pain in his back, neck, shoulders and head, and for pain-related symptoms. At trial in August of 2006, Points presented evidence that he had incurred medical bills in the amount of \$23,343.73. Points also presented the expert testimony of an economics professor, who opined that Points had incurred lost employment income due to disability caused by his injuries in the amount of \$246,862 and projected that Points's lost employment income for the future would be \$937,548, assuming he

worked until age 66. The jury returned a verdict in the amount of \$64,000, subcategorized on the verdict form as follows:

Non-Economic Damages:

Physical Pain and Suffering – past: \$10,000
Physical Pain and Suffering – future: 0
Permanent Impairment: 0
Loss of ability to enjoy life – past: \$10,000
Loss of ability to enjoy life – future: 0

Economic Damages:

Medical care/services – past: \$8,000
Medical care/services – future: 0
Loss of earning capacity – past: \$36,000
Loss of earning capacity – future: 0

The trial court approved the verdict, finding it to be neither manifestly insufficient nor unreasonable in light of the evidence presented. Our task on appeal is therefore limited to determining whether there is material evidence supporting the jury verdict, and we find that there is such evidence. The jury could have reasonably found from the evidence outlined above that Points had mostly or fully recovered from the injuries resulting from the accident and that his injuries occurring after he asked to be released from Dr. Bartsokas's care were caused by his attempts to lift and move the bodies and other activities resulting in overexertion. "[T]he amount of compensation in a personal injury case is primarily for the jury, and next to the jury, the most competent person to pass on the matter is the trial judge who presided at the trial and heard the evidence." *Foster v. Amcon Int'l, Inc.*, 621 S.W.2d 142, 143-44 (Tenn. 1981). Consequently, because there is material evidence supporting the verdict, we must affirm the jury verdict of \$64,000.

C. Admissibility of Cross-Examination of Plaintiff's Treating Physician

One of the doctors Points saw after December of 2002 was Dr. Jane Howard, a neurologist at Vanderbilt University. Points introduced into evidence Dr. Howard's video deposition for proof, which the jury saw in its entirety. Dr. Howard diagnosed Points with degenerative spine disease affecting both the cervical and lumbar spine, and post-polio syndrome, a condition that affects persons who previously had polio, as Points did when he was five years old. Dr. Howard testified that it was her opinion that the accident most likely caused Points's degenerative spine disease and post-polio syndrome to become symptomatic.

Points filed a pretrial motion in limine to exclude "all portions of the Defendants' cross-examination of Dr. Jane Howard regarding any possible causes of the Plaintiff's injuries." The trial court denied the motion in limine and allowed the jury to view the entire deposition testimony. Points relies on the case of *Hunter v. Ura*, 163 S.W.3d 686 (Tenn. 2005), in support of his argument that portions of his own witness's testimony in answering questions on cross-examination were too

speculative to be admissible. In *Hunter*, the Supreme Court emphasized that questions concerning admissibility of expert testimony are generally left to the trial court's discretion, stating:

Determining the admissibility, qualifications, relevance, and competency of expert testimony is left to the sound discretion of the trial court . . . Indeed, our function is only to determine whether the trial court abused its discretion in excluding the testimony and not to substitute our view for that of the trial court.

Hunter, 163 S.W.3d at 703 (citing *McDaniel v. CSX Transportation, Inc.*, 955 S.W.2d 257 (Tenn. 1997)).

In this case, Dr. Howard testified that Points's cervical spine MRI after the accident showed several disc protrusions and that she was unable to say whether the protrusions were caused by the accident:

Q: Now, would it be reasonable to believe that this disc protrusion was caused by the motor vehicle accident?

A: I don't think without having an MRI that pre-dated the accident there would be any way to say whether those disc protrusions were in existence prior to the accident or not.

Q: Okay. But a traumatic injury can cause this type of –

A: It can.

* * *

Q: And the study indicated a disc protrusion there [in the thoracic spine]. Again, that could be caused by the accident, but you have no way of knowing definitely.

A: Right. It could pre-date or be related to the accident, but without a prior scan there's no way to know.

On cross-examination, Dr. Howard testified as follows, providing responses that Points sought to exclude as unduly speculative:

Q: And there can be literally thousands of things that can cause a disc bulge; correct? Sneezing, picking up something too heavy, bending over, stooping, all of those things; correct?

A: Sure, and just normal wear and tear of daily life, yeah.

* * *

Q: You were also asked about the disc bulges and that you couldn't state with a reasonable degree of medical certainty that the protrusions were caused from the accident?

A: Correct.

Q: Equally so, can you say with a reasonable degree of medical certainty that the protrusions existed before the accident?

A: I can't say whether they did or whether they didn't.

As stated, Points argues that the Supreme Court's decision in *Hunter* mandates the conclusion that the trial court erred in allowing the portions of Dr. Howard's testimony that Points found objectionable. In *Hunter*, the Court upheld the trial court's discretionary decision to exclude the testimony of a defense witness who would have testified to a "possible alternative cause" of death other than a cause attributable to the defendant's negligence. *Hunter*, 163 S.W.3d at 702. The *Hunter* Court cited the trial court's conclusion that "the overwhelming weight" of the challenged expert's testimony indicated that "he believes this theory is only a possibility." *Id.* Finding no abuse of discretion in the trial court's judgment that the defense expert's testimony was inadmissibly speculative, the Supreme Court concluded:

In reaching our conclusion, we necessarily reject the view that Dr. Hays' testimony was admissible as evidence of a "possible" alternative to the plaintiff's theory under *Sakler v. Anesthesiology Assocs., P.S.C.*, 50 S.W.3d 210 (Ky. Ct. App. 2001).

* * *

In our view, the *Sakler* rule is not needed to avoid shifting the burden of proof to the defendants and would instead, if applied literally, allow defendants to use expert testimony as to "possible" theories or causes without satisfying the safeguards in Rules 702 and 703 of the Tennessee Rules of Evidence. These evidentiary rules require a trial court to determine 1) whether expert testimony will substantially assist the trier of fact in determining a fact in issue, and 2) whether the facts and data underlying the testimony indicate a lack of trustworthiness. Tenn. R. Evid. 702, 703. Indeed, expert testimony that a trial court determines is speculative would not "substantially assist" the trier of fact. Nothing in the evidentiary rules or elsewhere exempts defendants from these fundamental evidentiary inquiries.

In addition, determining the admissibility, qualifications, relevance, and competency of expert testimony is left to the discretion of the trial court. See *McDaniel*, 955 S.W.2d at 263.

Id. at 703-04.

In the present case, Points's reliance on *Hunter* is misplaced because of the significant differences between the two cases. In *Hunter*, the testimony excluded was that of an expert witness called by the defendant in an attempt to provide a alternative theory of an entirely different, independent cause of injury, which the trial court found to be based on mere speculative possibility and which was arguably improbable. *Id.* In contrast, the present case presents a challenge not of an opposing witness who is proffering an alternative theory, but of the party's own witness in response to questions on cross-examination. Furthermore, the testimony sought to be excluded as speculative is not an alternative theory of causation as in *Hunter*, but rather mostly a reiteration of a conclusion that Dr. Howard had already testified to on direct examination – that she was unable to say that the disc protrusions in Points's spine were caused by the accident. One of the purposes of cross-examination is to “adduce from a witness any information that may clarify, qualify, or undercut a witness's testimony on direct examination, impair its effectiveness, or affect the inferences the trier-of-fact might draw.” *Overstreet v. Shoney's, Inc.*, 4 S.W.3d 694, 708 (Tenn. Ct. App. 1999). This court noted in *Overstreet* that, as a general rule, “[l]awyers should be accorded wide latitude in cross-examining witnesses.” *Id.* We find no abuse of discretion in the trial court's decision to deny Points's motion in limine and to allow the jury to see the entire testimony of his medical expert, Dr. Howard.

IV. Conclusion

For the aforementioned reasons, the judgment of the trial court is affirmed. Costs on appeal are assessed to the Appellant, C. Rick Points.

SHARON G. LEE, JUDGE